

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

PEIERRE L. FREEMAN,
Appellant,

DOCKET NUMBER
DA-0353-22-0125-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: February 15, 2023

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Peierre L. Freeman, De Soto, Texas, pro se.

Theresa M. Gegen, Esquire, St. Louis, Missouri, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member
Tristan L. Leavitt, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed his restoration appeal for lack of jurisdiction. On petition for review, the appellant does not make any argument but instead submits additional evidence. Petition for Review (PFR) File, Tab 1. Generally, we grant petitions

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED to clarify the basis for concluding that the appellant failed to nonfrivolously allege Board jurisdiction, we AFFIRM the initial decision.

¶2 In the initial decision, the administrative judge considered the four substantive jurisdictional elements as set forth in *Hamilton v. U.S. Postal Service*, [123 M.S.P.R. 404](#), ¶ 12 (2016), in arriving at her conclusion that the appellant failed to nonfrivolously allege Board jurisdiction over his appeal. Initial Appeal File (IAF), Tab 16, Initial Decision (ID) at 2-7. She found that the appellant nonfrivolously alleged that he was absent from his position due to a compensable injury, that he had partially recovered, and that the agency denied his request for restoration. ID at 5. We agree with those conclusions. She also considered whether the appellant nonfrivolously alleged that the denial of restoration rights—which she identified as the discontinuation of the appellant's July 2018 modified duty assignment—was arbitrary and capricious. ID at 5. She cited case law concerning when, under the agency's internal rules, it may discontinue a modified assignment consisting of tasks within an employee's medical restrictions but found that the requirements of the appellant's July 2018 modified job assignment were not within his 2021 updated medical restrictions. ID at 6.

As a result, she concluded that the appellant failed to nonfrivolously allege that the agency acted arbitrarily and capriciously in discontinuing his July 2018 modified assignment and thus that he failed to establish Board jurisdiction over his appeal. ID at 7.

¶3 After the issuance of the initial decision, the Board issued a decision in *Cronin v. U.S. Postal Service*, [2022 MSPB 13](#), which clarified when a denial of restoration may be arbitrary and capricious. In *Cronin*, the Board held that, although agencies may undertake restoration efforts beyond the minimum effort required by OPM under [5 C.F.R. § 353.301\(d\)](#), an agency's failure to comply with self-imposed obligations cannot itself constitute a violation of [5 C.F.R. § 353.301\(d\)](#) such that a resulting denial of restoration would be rendered arbitrary and capricious for purposes of establishing Board jurisdiction under [5 C.F.R. § 353.304\(c\)](#). *Cronin*, [2022 MSPB 13](#), ¶ 20. Rather, the issue before the Board is limited to whether the agency failed to comply with the minimum requirement of [5 C.F.R. § 353.301\(d\)](#), i.e., to search within the local commuting area for vacant positions to which it can restore a partially recovered employee and to consider him for any such vacancies. *Id.* (citing *Sanchez v. U.S. Postal Service*, [114 M.S.P.R. 345](#), ¶ 12 (2010)).

¶4 In light of *Cronin*, we have reexamined the appellant's pleadings below and on review and find that they do not contain any allegation that the agency's action was arbitrary and capricious because it failed to comply with the minimum requirements of [5 C.F.R. § 353.301\(d\)](#). IAF, Tabs 1, 12, 13; PFR File, Tab 1. On that basis, we find that the appellant failed to nonfrivolously allege Board jurisdiction over his claims, and we modify the initial decision to reflect as much.

¶5 On review, the appellant submits new evidence including emails about his new modified job offer, a letter from his new physician, mail receipts, claim for compensation forms, signed statements regarding previous incidents with his supervisors, an old settlement agreement, and other various emails and papers. PFR File, Tab 1. He provides no explanation as to why he did not provide this

evidence, which predates the initial decision, to the administrative judge. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980) (finding that the Board generally will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence); [5 C.F.R. § 1201.115](#)(d). In any event, none of this evidence is material to the outcome of this appeal. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980) (stating that the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision).

NOTICE OF APPEAL RIGHTS²

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). You may obtain review of this final decision. [5 U.S.C. § 7703](#)(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. [5 U.S.C. § 7703](#)(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

² Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you

were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. [5 U.S.C. § 7703](#)(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , [137 S. Ct. 1975](#) (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* [42 U.S.C. § 2000e-5](#)(f) and [29 U.S.C. § 794a](#).

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. [5 U.S.C. § 7702](#)(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. [5 U.S.C. § 7702](#)(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
 Equal Employment Opportunity Commission
 P.O. Box 77960
 Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
 Equal Employment Opportunity Commission
 131 M Street, N.E.
 Suite 5SW12G
 Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under [5 U.S.C. § 2302\(b\)\(8\)](#) or other protected activities listed in [5 U.S.C. § 2302\(b\)\(9\)\(A\)\(i\), \(B\), \(C\), or \(D\)](#). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.³ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. [5 U.S.C. § 7703\(b\)\(1\)\(B\)](#).

³ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

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Washington, D.C. 20439

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http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

Washington, D.C.

/s/ for

Jennifer Everling
Acting Clerk of the Board